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No. 86-1064

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

MARIO M. CUOMO, Governor of the State of New York, and THOMAS A. COUGHLIN III, Commissioner of the New York State Department of Correctional Services,

Petitioners,

vs.

RICHARD J. KOEHLER, Commissioner of the New York City Department of Corrections; HARVEY PIERCE, JR., Warden, New York City House of Detention for Men; D. MICHAEL PEPE, CLAYTON JEMMOTT and JOHN KIERNON, Deputy Wardens, New York City House of Detention for Men;

Respondents,

(captioned continued on next page)

MUNICIPAL RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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and EDWARD I. KOCH, Mayor of the City of New York, individually and in their official capacities,

-and-

JAMES BENJAMIN, MIGUEL CALINDEZ, BRUCE HAYES, JOSE SALDANA and ROBERT ESCHERT, detainees of the New York City House of Detention for Men, individually and on behalf of all other persons similarly situated,

Respondents.

QUESTIONS PRESENTED

1. In view of the finding by the Court of Appeals that the failure of petitioners to expeditiously accept from New York City persons sentenced to terms of imprisonment in State correctional facilities may contribute to unconstitutional overcrowding in New York City's jails and make it impossible for the City to comply with prior District Court judgments establishing acceptable conditions of confinement in those jails, was the decision of the Court of Appeals affirming an order of the District Court granting a preliminary injunction requiring petitioners to accept custody of all "State ready" inmates within forty-eight hours of their processing inconsistent with the decision of this Court in Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984)?

2. Was the Court of Appeals correct in holding that the District Court had authority

under the All Writs Act, 28 U.S.C. §1651(a), to issue the preliminary injunction, where that Court found that the District Court was faced with the necessity of acting immediately to relieve unconstitutional conditions of confinement in City jails which might be attributed to petitioners?

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MUNICIPAL RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

(1)

Petitioner seeks to have this Court review by writ of certiorari an opinion of the Second Circuit dated September 25, 1986 which unanimously affirmed an order of the United States District Court for the Southern District of New York dated March 27, 1986 which had joined the petitioners as third-party defendants in Benjamin v. Malcolm, 75 Civ. 3073 pending a determination whether they should be

retained permanently as defendants and granted a preliminary injunction compelling them to accept custody of each sentenced male, adult person (State ready) housed in New York City correctional facilities within forty-eight hours after the papers necessary for transfer have been completed.

Since the decision sought to be reviewed here is the culmination of a long history of litigation between the State and the City, it is necessary to set forth the proceedings in detail.

(2)

Benjamin v. Malcolm was commenced by the Legal Aid Society in 1975 on behalf of all pre-trial detainees housed in the New York City House of Detention for Men on Rikers Island ("HDM"). The plaintiffs alleged that they were being subjected to conditions of confinement which violated their constitutional rights. A trial was begun

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before Judge Lasker in the fall of 1976 and completed in the spring of 1977.

In 1978 the City and the plaintiffs commenced negotiations in an attempt to resolve some of the outstanding issues which resulted in consent decrees relating to conditions of confinement.

In September 1979 the parties entered into a stipulation in which it was agreed that the record in the case established, inter alia, that at the time of trial, the housing blocks at HDM were overpopulated and that such overpopulation resulted in an

> "... atmosphere of tension and hostility, a strain on all of the institution's facilities, and interference with supervision, protection and provision of services to the plaintiff class."

The stipulation reserved to the plaintiffs the right to litigate the issue of the appropriate remedy.

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In August 1980, in response to a motion by the plaintiffs to impose a population cap on HDM, Judge Lasker issued an order limiting the population at that facility to 1200. In opposing the plaintiffs' application, the City maintained that overcrowding at HDM was being substantially affected by the presence of large numbers of State readies. In his opinion granting the relief (which is set forth at 495 F. Supp. 1357), Judge Lasker observed at 495 F. Supp. 1362:

> "On July 17, 1980, there were 657 such convicted prisoners and 140 alleged [parole] violators in custody at the HDM complex. So serious is this aspect of the problem that on April 2, 1980 the City Commissioner of Correction discontinued acceptance of 'technical parole violators' only to find that the State responded by increasing the number of newly convicted prisoners which it assigns to HDM.
>
> The City is entitled to understanding on account of the aggravation of its burden caused by the injection into its

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correctional facilities of such a large number of State prisoners."

At the time Judge Lasker made these comments, the number of State ready inmates housed by the City had been steadily increasing for several years. In 1977 the average daily number of State readies housed by the City at HDM was 189. This number increased to 226 in 1978, 287 in 1979 and, as noted in Judge Lasker's opinion, had climbed to 650 by August of 1980 (63-64).[1]

As a result of the severe impact which the presence of large numbers of State readies had on the ability of the City to provide services to inmates housed at HDM, the City moved in August 1980 to join then

---

[1]Unless otherwise indicated, numbers in parentheses preceded by a letter refer to the Appendix to the Petition for Certiorari. All other references are to the pages of the Joint Appendix submitted to the Second Circuit.

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Governor Carey and his Commissioner of Correctional Services as defendants in Benjamin, pursuant to Fed. R. Civ. P. 19 and 21. In its moving papers, the City noted that the State is required under New York Criminal Procedure Law, §430.30 to assume custody of State ready inmates "forthwith" (68). The City also contended that the overpopulation of HDM and the difficulties in providing services to persons housed there were attributable to the policies of the State and that the State, along with the City, should be held responsible for any deprivation of the inmates' constitutional rights which resulted from overcrowding (69). The City maintained (70):

> "... the State Commissioner of Correctional Services and the Governor should bear part of the responsibility for remedying any unacceptable conditions of confinement at HDM which result from overcrowding.

* * *

> The State has the ability to render ineffective any population ceiling which this Court may establish by simply ceasing to accept State readies for a period of time or by further slowing the rate at which it accepts such individuals for confinement in State institutions."

On November 19, 1980, Judge Lasker ruled that the City's motion was meritorious. Benjamin v. Malcolm, (E2). Reported at 88 F.R.D. 333. The Court held (E2-3):

> "... it is obvious that the impact of the presence of State prisoners in such large numbers constituted an insurmountable roadblock to the fulfillment of the City's obligations. There is no doubt, therefore, that the City's motion under Rule 19 was appropriately brought.
>
> * * *
>
> [c]omplete relief [cannot] be granted to the parties in the absence of the State officers, since without some assurance as to the number of State prisoners who may be housed at HDM, the City cannot exercise control of its own compliance with this Court's orders.

Judge Lasker did not formally order the joinder of the State officials at that time

Commissioner of Correctional Services (58-59). After a non-jury trial, the Court granted the relief sought by the City. Judge Lasker stated (58):

> "... a court can't possibly solve problems of this magnitude, even in part, without having before it all of the parties whose actions contribute to the problem itself."

The District Court directed the State defendants to accept State ready inmates from HDM within forty-eight hours after their transfer papers have been completed, and issued an order to that effect on August 20, 1981 (F7-8).

In the fall of 1981 the State defendants moved pursuant to Fed. R. Civ. P. 60(b) for relief from the August 20, 1981 order, so as to permit them to accept State readies from the City only when the State correctional system had space available for them. In denying that motion (Benjamin v.

Malcolm, (G2, Reported at 528 F. Supp. 925), Judge Lasker noted (G10):

> "... in the last analysis what the State proposes here is to equalize unconstitutionality by requiring the City to share the burden of impermissible overcrowding with the State. The remedy does not lie in equalizing unconstitutionality but in eliminating it."

The State complied with the forty-eight hour order until the summer of 1984, when the State Commissioner of Correctional Services requested that the City voluntarily relieve him for a limited period of the obligation to accept State readies within forty-eight hours (59). The City agreed to his request and entered into a stipulation with the State which provided that until November 1, 1984, the State could delay accepting State readies until ninety-six hours after processing (79-80). On November 1, 1984 the parties were to reevaluate the agreement, but it was to terminate no later than January 1, 1985

(80). Commencing January 1, 1985 the State agreed to accept State readies within forty-eight hours (80).

The City was able to accommodate the State because it had embarked upon an aggressive construction program. The City has increased its correctional capacity by almost fifty percent since 1979 (51). In 1986 the City expected to add approximately 975 additional beds (51). In 1987 and 1988 the City intends to add approximately 800 and 160 beds respectively (51). In early 1989, it plans to add an additional 500 beds (51).

In recent years, the State has also added to its correctional capacity (120). However, in 1984, the State decided to close the 1000 bed Long Island Correctional Facility ("LICF"), which had been opened in 1982. The granting of a preliminary injunction against the closing of that facility

was affirmed by the Second Circuit in Mitchell v. Cuomo, 748 F.2d 804 (1984).

Notwithstanding that its correctional system was allegedly filled to 116 percent of capacity at that time, the State based its decision to close LICF on the ground that it had not afforded an "adequate opportunity for community participation in the planning process" of that facility Id. at 805. The State argued that although the closure of LICF would reduce its housing capacity by 1000 beds:

> "... an expected increase from new construction of 1900 beds by the end of this year [1984] would allow the [State] system to safely absorb the LICF inmates and all other inmates entering the system during that period" Id. at 807.

The Second Circuit had affirmed the granting of the preliminary injunction barring the closure of LICF pending a trial on the merits. On February 5, 1985, the parties in Mitchell v. Cuomo entered into a

stipulation permitting the State to close that facility (60).

As noted above, the State had agreed to resume accepting State ready inmates within forty-eight hours of processing when its stipulation with the City expired on January 1, 1985. However, it did not comply with that term of the stipulation. Subsequent to the expiration of the stipulation, the State did not even continue to accept State readies within ninety-six hours of processing (59-60).

Instead, in February 1985 the State defendants moved to vacate the August 20, 1981 order requiring them to accept State readies within forty-eight hours (50, 57). They based their application upon the decision of the this Court in Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984) (Pennhurst II), in which it was held that the Eleventh Amendment deprives a

federal court of jurisdiction of a suit for injunctive relief against State officials based on State law.

The average daily number of State readies for the month of February 1985 was approximately 130 (50). When the State's motion to vacate was argued on May 13, 1985, the number of State readies had declined to 57 (50). Immediately after the oral argument, however, the numbers of State readies housed by the City began to increase significantly. By June of 1985, the average daily number of State readies in City correctional facilities had risen to 284 (48-49). That number increased to 423 in August 1985 and to approximately 500 in January 1986 (49).

In a decision dated January 30, 1986, Judge Lasker granted the State's motion (D1-14). Reported at 626 F. Supp. 1264. He noted that his 1981 determination to join

the State defendants was based upon their obligation under Criminal Procedure Law, §430.30 to accept State readies from the City (D3). Judge Lasker concluded that the Pennhurst II decision dictated that the State's motion be granted because of his "reliance upon State law as providing the legal basis for granting the relief" (D7).

The Court, however, left open the question whether the State officials could be joined on the basis of a finding that their failure to expeditiously accept State readies significantly contributed to the violation of plaintiffs' constitutional rights or that their "actions are so inexorably tied to the constitutional violation that the Court has jurisdiction to order relief" (D9-10). Such findings, Judge Lasker observed, "[are] the minimum that Pennhurst II requires" (D10). In this connection, he observed (D11):

> "Throughout the litigation we have stated that it is not apparent that

> the City will be able to fulfill its obligations without an order from the court directing the State defendants to take some action. Our decision should not be construed as abandoning that sentiment or as expressing the opinion that all means through which the City may obtain relief are foreclosed. We have not held, nor do we now, that acts or omissions which frustrate the vindication of a federal right can never be significant enough to create a sufficient basis for jurisdiction over state officials."

The Court deferred vacating the August 1981 order for a period of thirty days, "pending a determination of the parties' further intentions" (D11). Notwithstanding the fact that Judge Lasker specifically stayed the vacatur of the forty-eight hour order, the State officials continued their failure to abide by its terms (61).

On February 20, 1986, the City moved pursuant to Fed. R. Civ. P. 19, 20 and 21 to join the State officials as defendants in Benjamin v. Malcolm on the ground that the presence of large numbers of State prisoners

in City correctional facilities made it difficult, if not impossible, to comply with the District Court's orders on conditions of confinement and population control (41-43, 56-61).

In support of the motion, Jacqueline McMickens, the City Commissioner of Correction, submitted an affidavit in which she stated that the State Commissioner of Correctional Services did not advise her on a weekly or monthly basis as to his plans for accepting State prisoners (51). As a consequence, the City's ability to plan for its short-term and long-term population needs are adversely affected (51-52). Commissioner McMickens observed that the City, constrained by time-consuming and complex budgetary and planning processes, lacks the ability to modify its ambitious building program to take into account constant and large fluctuations in the

numbers of State prisoners which the City must house (52).

It is Commissioner McMickens' view that the State prisoners which the City holds require high security detention facilities and should occupy cells rather than dormitories (52). As a consequence, the City has been required to devote a disproportionate amount of its limited cell space to State prisoners, while relegating its pre-trial detainees to less desirable dormitories (52-53). She noted that since June 1985, the City has devoted approximately fifty percent of its newly added capacity to house State inmates (51).

"[T]he lack of control over such a large and unpredictable population", Commissioner McMickens observed, "has a direct impact on the City's ability to fulfill its obligations under [the] Court's orders" (51). She stated that the presence of the

large numbers of State inmates made the City's maintenance program more difficult (53) and had exacerbated the task of "providing adequate security and other essential services such as visiting, recreation, medical care, food and educational programs" (53).

It was Commissioner McMickens' conclusion that the "effect of the State's action is to make the City virtually an annex of the State correctional system", and that the ability of the State to control the number of State prisoners in City jails would "neutralize anything the City may have done to properly manage its system ..." (51, 53).

In response to the City's moving papers, the State continued to maintain that the Eleventh Amendment bars federal subject matter jurisdiction of this case. Moreover, the State contended that they have accepted custody of inmates from New York City

correctional facilities in a reasonably timely manner. The State also alleged that New York City receives a preference over other localities with respect to the acceptance of prisoners (J6). Commissioner Coughlin acknowledged, however, that (J6):

> "At times, including recent months, starting in about October, 1985, the pressure of the number of new inmates in counties outside New York City has been such that it has been necessary to take new inmates from other counties before accepting all State ready inmates in New York City."

The State Commissioner of Correctional Service maintained that the City's statistics on the numbers of State readies which it houses are inaccurate (J8). He also argued that the fluctuation in the State ready population are traditional seasonal trends (J8-9).

(3)

In granting the City's request for preliminary relief, Judge Lasker concluded that Pennhurst II did not prohibit a federal

court from ordering relief against State officials whose actions may be necessary to implement, or to avoid the frustration of, a judgment which rectifies a constitutional violation (C1, 4). He stated (C5):

> "... in the case at hand the City is the party which would suffer contempt penalties for noncompliance with Court orders limiting inmate population in the event those limits were exceeded. Thus, the City has standing to request relief from being held accountable for actions by the State defendants over which it has no control but which allegedly cause or contribute to violations of the Court's orders."

Judge Lasker concluded that, although the State's duty to take custody of State ready inmates arises under State law, the jurisdiction of the federal court was not defeated in this case (C5-6). He noted that there are "numerous situations" where "obligations under State law may give rise to a federal claim" (C5-7).

In finding a basis for jurisdiction over the State officials under the provisions of the All-Writs Act (28 U.S.C. §1651[a]), Judge Lasker relied on this Court's decision in United States v. New York Telephone Co., 434 U.S. 159 (1977), which held that the power conferred by the All-Writs Act extends to nonparties who are in a position to frustrate the implementation of a court order (C5-6). He noted (C6):

> "... if it is concluded that the presence of State officials is necessary for the full satisfaction of constitutional rights, joining them in the litigation is, in our view, not only consistent with the purpose of the All Writs Act, but also with the reasoning underlying the exception to the Eleventh Amendment which was created in Ex Parte Young, 209 U.S. 123 (1908), namely, 'to promote the vindication of federal rights' and 'hold State officials responsible to the supreme authority of the United States.' Pennhurst II, 104 S. Ct. at 910."

Having found that the Court had jurisdiction to make the State officials parties

to this case, Judge Lasker next considered whether the City had satisfied the criteria for obtaining preliminary injunctive relief (C7-13). He concluded (1) that the City would be irreparably harmed without such relief (C7-9), (2) that the City's application raised sufficiently serious questions going to the merits to make them fair grounds for litigation (C9-11), and (3) that the balance of hardship tipped decidedly in the City's favor (C11-13).

With respect to the showing of irreparable injury, the District Court found (C8)):

> "The claim that such varying numbers [of State readies] wreak havoc with a municipality's ability to manage its facilities and interfere with the on-going planning and building process in which the City is currently engaged is persuasive, and monetary damages cannot adequately compensate the City (nor the plaintiff class) for the continuing injury. In short, the City has met its burden of showing irreparable harm.

> In this connection it is worthy of note that the City only seeks a continuation of the status quo: that is, the continuance of an order that has been in effect in this case for almost five years."

In holding that the balance of hardship tipped decidedly in the City's favor, Judge Lasker reaffirmed the conclusions which he previously reached when he initially joined the State officials as defendants in 1981. At that time he found that State correctional facilities were more secure and remote from population centers than City correctional facilities and that the State correctional system, being nearly three times the size of the City system, could more readily absorb the State readies (C13). Judge Lasker was also of the view at that time that the State prison population was more stable and manageable than the population found in a pre-trial detention facility (C13). He stated

that these conclusions "remain valid today" (C12).

In addition, he noted (C13):

> "Finally, while an injunction continuing the requirement that the State accept state inmates within forty-eight hours will continue the State's burden, it does not, in the present posture of the case, increase it, while denying the injunction would leave the City vulnerable to the possibility, if not probability, of a very significant increase in its inmate population."

Based upon these findings, Judge Lasker found that the City's motion was "appropriately brought" (C13). He stated that any final decision to retain the State officials in the case would await (C13):

> "... the disposition of the dispute as to whether the State's actions or proposed actions do or would hereafter place the City in a position of noncompliance with the court's decrees."

This opinion is reported at 629 F. Supp. 713.

EDITOR'S NOTE

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In affirming the order of the District Court, the Court of Appeals, after reviewing the history of the lawsuit, noted that, during the long period of litigation (A15):

> "[i]t does not appear that the State was ever denied the opportunity to challenge the federal constitutional basis of the underlying consent order or the findings of unconstitutionality made by Judge Lasker in 1983."

The Court further noted that the State at the time of the appeal did not offer any proof to contradict the findings. Moreover, since the relief was preliminary, the State could rebut the findings at the trial on the permanent injunction (A15).

With respect to this Court's decision in Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) (Pennhurst II), the Court of Appeals rejected the State's claim that it should be dismissed because its argument "ignores the district court's finding that the refusal of State

officials promptly to accept state-ready prisoners also violates a federal interest in vindicating the already-adjudicated constitutional rights of prisoners housed at the City's HDM" (A9).

The Court also found that jurisdiction over the State was appropriate under the All Writs Act, 28 U.S.C. §1651(a). The circumstances were an exception because the District Court "was faced with the necessity of acting immediately to relieve already-adjudicated unconstitutional conditions which might be attributed in part to the State and of avoiding the delay that could be entailed in the relitigation of those conditions" (A13). Since full relief against the unconstitutional conditions could not be obtained through an order only applicable to New York City, the joinder of the State was appropriate (A14).

In concluding the Court observed that the record supported the granting of the preliminary injunction. It noted that the preliminary injunction "simply preserves a status quo that existed for years after the district court's August 1981 order" (A16).

The opinion is reported at 803 F.2d 46.

Reasons For Denying Petition

For a Writ of Certiorari

ARGUMENT

IN VIEW OF THE FINDING BY THE COURT OF APPEALS THAT THE FAILURE OF PETITIONERS TO EXPEDITIOUSLY ACCEPT FROM NEW YORK CITY PERSONS SENTENCED TO TERMS OF IMPRISONMENT IN STATE CORRECTIONAL FACILITIES MAY CONTRIBUTE TO UNCONSTITUTIONAL OVERCROWDING IN NEW YORK CITY'S JAILS AND MAKE IT IMPOSSIBLE FOR THE CITY TO COMPLY WITH PRIOR DISTRICT COURT JUDGMENTS ESTABLISHING ACCEPTABLE CONDITIONS OF CONFINEMENT IN THOSE JAILS, THE DECISION OF THE COURT OF APPEALS AFFIRMING AN ORDER OF THE DISTRICT COURT GRANTING A PRELIMINARY INJUNCTION REQUIRING PETITIONERS TO ACCEPT CUSTODY OF ALL "STATE READY" INMATES WITHIN FORTY-EIGHT HOURS OF THEIR PROCESSING WAS NOT INCONSISTENT WITH THE DECISION OF THIS COURT IN PENNHURST STATE SCHOOL AND HOSPITAL V. HALDERMAN, 465 U.S. 89 (1984).

THE COURT OF APPEALS CORRECTLY HELD THAT THE DISTRICT COURT HAD AUTHORITY UNDER THE ALL WRITS ACT, 28 U.S.C. §1651(a), TO ISSUE THE PRELIMINARY INJUNCTION.

(1)

The only possible argument that petitioners have to challenge the preliminary injunction is that Pennhurst II, supra, denies the District Court the jurisdiction to join them in this case. Indeed, when the District Court granted the City's motion to join petitioners in 1981, no appeal was taken from that determination. Nor did they appeal from the District Court's denial of their 1981 motion to vacate the forty-eight hour order. Benjamin v. Malcolm, 528 F. Supp. 925. However, both the District Court, in granting this preliminary injunction, and the Court of Appeals, in affirming it, acted consistently with the principles enunciated in Pennhurst II.

That case concerned conditions of confinement at a Pennsylvania institution for the care of the retarded. In an earlier decision involving that institution, this Court had reversed the Third Circuit and held that the Federal Developmentally Disabled Assistance and Bill of Rights Act, 42 USC 6001 et seq., did not create a substantive cause of action. As a result, the matter was remanded to the Court of Appeals to determine whether a remedy could be granted on the basis of the state law, the United States Constitution or other federal statutes. On remand the Court of Appeals again upheld a remedy, finding that a specific state statute fully supported its prior judgment. The latest Pennhurst appeal was from this judgment of the Court of Appeals.

In this Court the State argued, inter alia, that the Eleventh Amendment prohibited

a federal court from ordering State officials to implement a remedy based upon a pendent state claim. In reversing the Court of Appeals, the Supreme Court held that the Eleventh Amendment barred a federal court from joining State officials except in those instances where their presence was needed to promote the vindication of federal rights. 465 U.S. at 105-106. The Court contrasted the facts presented in Pennhurst II with those in Ex parte Young, 209 U.S. 123 (1908), the seminal case on Eleventh Amendment immunity of State officials. In Ex parte Young the Court held that the Eleventh Amendment does not bar a federal court from granting injunctive relief when a State official engages in action which violates the Constitution. Subsequently, in Edelman v. Jordan, 415 U.S. 651 (1974), the Court limited Ex parte Young by holding that when there is a violation of federal law, the Court

can award injunctive relief but not retroactive monetary relief.

In harmonizing the State's immunity under the Eleventh Amendment and a party's right to obtain a remedy for a violation of federal law, this Court stated in Pennhurst II (465 U.S. at p. 106):

> "This need to reconcile competing interests is wholly absent, however, when a plaintiff alleges that a state official has violated state law. In such a case the entire basis for the doctrine of Young and Edelman disappears. A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law." (Emphasis the Court's.)

Pennhurst II is readily distinguishable from the instant case. As the Court of Appeals and the District Court noted, the previous determinations to join the State defendants and to impose a remedy against them was designed to effectuate the constitutional rights of the plaintiffs (A10,

C5). Both the Court of Appeals and the District Court emphasized that the State's expeditious acceptance of State readies was a significant component of the remedy necessary to satisfy the plaintiffs' constitutional claims. Benjamin v. Malcolm, (A9, 13), 803 F.2d 46, 51, 53 (2d Cir., 1986), (C5-6), 629 F. Supp. 713, 715-716 (1986). In effect, the presence of large numbers of State readies in City correctional facilities contributed to a violation of the plaintiffs' constitutional rights, and interfered with the City's ability to comply with federal Court orders.

The history of this case overwhelmingly supports the conclusion of the Courts below. Beginning in the late 1970's and continuing to the present time, the State has controlled the rate of acceptance of the State ready population to redress population problems in State facilities. The result has been an intolerable situation for the City of New

York. During this same period, the City had entered against it a series of orders establishing population caps on HDM and other facilities. In addition, consent orders relating to conditions of confinement placing substantial demands on the City's ability to manage it facilities were entered into over the last decade.

By its past actions, the State has indicated that it will act to assume custody of State readies expeditiously only when ordered to do so by a court or when court action is imminent. Prior to our initial motion to join the State officials in August, 1980, the population of State readies had risen to 650. In the three months during which that motion was pending, the State reduced the population so that by November 1980, the State ready population declined to 32. Indeed, Judge Lasker noted that the filing of the motion in 1980:

> "... appears to have spurred constructive responses on the part of the Governor and the Commissioner ..." 88 F.R.D. 333, 335.

Following the dismissal without prejudice of the City's motion to join, the State again began to back-up the State readies. Within seven months after Judge Lasker's determination, the population of State readies had again grown to approximately 600. At that point, the District Court first joined then Governor Carey and Commissioner Coughlin and ordered them to accept State readies within forty-eight hours.

In the summer of 1984 the City granted the State permission for the rest of that year to delay accepting State readies for up to ninety-six hours after their processing had been completed. The State agreed to resume accepting State readies within forty-eight hours on January 1, 1985. However, as noted above, the State never

fulfilled its promise to resume the expeditious acceptance of State readies and did not even continue to accept them within ninety-six hours. In 1985 and early part of 1986 the State slowed the acceptance of State readies to an extent that, at the time the City again moved to join the State officials in February, 1986 the City was housing approximately 500 State readies.

The State officials view of the City as an annex to the State correctional system renders difficult, if not impossible, our ability to comply with the District Court's prior orders concerning conditions of confinement. The City has two fundamental responsibilities with respect to correction. First, it must provide adequate space for all detainees, and, second, it must provide them with appropriate conditions of confinement. In order to meet our obligations, the City has adopted an extraordinary building

program which will have increased its capacity by more than fifty percent since 1979. This building program was based on an assumption that the State would not use the City jail system as its safety valve. The presence of these large numbers of State readies, in addition to adversely affecting the capital construction program, seriously impedes our ability to provide security and services to the pretrial detainees who are the City's proper responsibility.

It is noteworthy that shortly before the State began delaying acceptance of State readies in 1985, it closed the 1000 bed Long Island Correctional Facility. Within four months after entering into a stipulation permitting them to close that prison, the numbers of State readies held by the City had risen dramatically. This increase occurred notwithstanding the statements to

the Court of Appeals in Mitchell v. Cuomo, 748 F.2d 804 (2d Cir., 1984) that the State would be able to "safely absorb" all inmates entering the State correctional system despite the closure of LICF Id. at 807.

The State's position in Mitchell v. Cuomo totally undermines their position to this Court in the instant case that its back-up of State readies in City facilities is necessitated by its responsibility to accept all State readies throughout the State (Petition, pps. 7-8). The State's decision to close a structurally sound facility shortly before it began to back-up State readies was not reasonable. The State ought not to be able to close a prison and at the same time maintain that it cannot expeditiously accept State readies where it is undisputed that the back-up of State readies in City facilities has a direct impact on the City's ability to comply with prior Court orders.

The analysis applied by the Court of Appeals here was also followed by the Sixth Circuit when considering whether to join the State of Kentucky in Tate v. Frey, 735 F.2d 986 (1984), a case concerning conditions in one of its county's jails.

This ability of the State to frustrate a municipality's efforts to provide acceptable conditions of confinement in its detention facilities was the ground adopted by the Sixth Circuit in Tate v. Frey, 735 F.2d 986 (1984) to join the State of Kentucky in a case concerning conditions in one of its county's jail.

In Tate the inmates of a county jail in Kentucky brought a civil rights action against the superintendent of that institution alleging unconstitutional conditions of confinement. The county officials sought to join State correction officials in a third-party complaint which sought money damages and a

preliminary injunction enjoining State correction officials from refusing to timely accept felons incarcerated in the county jail awaiting transfer to State facilities. The District Court permitted the State to be joined and directed a hearing on the application for a preliminary injunction. At the conclusion of the hearing, the Court found certain violations concerning conditions of confinement and requested that all the parties join in a program designed to reduce the overcrowding in the jail. After the parties reported that they were unable to reach an agreement, the District Court issued an order compelling the State officials to immediately accept all State readies in excess of thirty. The second portion of the injunction enjoined Kentucky from permitting any State ready inmates to remain incarcerated at the county jail for more than thirty days after the imposition of sentence.

The Kentucky Statute cited by the Court placed the responsibility for housing convicted felons upon the State. It was silent, however, on the amount of time that a State correctional official has to accept custody of a person held in a local facility who is sentenced to serve a term of imprisonment with the State. As a consequence of overcrowding in State facilities, Kentucky had adopted a "controlled intake policy", whereby it only accepted State readies when it had space in State facilities (735 F.2d at 988, n. 1).

The State appealed on the ground that the county had failed to allege any substantive basis to support a claim for relief against it. Subsequent to the filing of the appeal but before the decision of the Sixth Circuit, this Court decided Pennhurst II. Based on that decision, the State also urged that the injunction was granted in

error because it was merely "... requiring the state to conform its actions to state law ...". (739 F.2d at 989).

In affirming the order of the District Court, the Sixth Circuit cited a number of factors particularly applicable to the instant case. In distinguishing Pennhurst II the Court noted that the District Court had made a determination that the controlled intake procedure had contributed to the overcrowding of the county jail and (735 F.2d at 989):

> "... complete relief would be elusive, if not impossible, to achieve absent joinder of the State as a third party to this action."

In addition, the Court of Appeals found that the District Court opinion was based on a finding that the unconstitutional conditions of confinement were directly attributable to overcrowding (735 F.2d 990). This overcrowding was in part due to the actions of the State defendants. Since the actions

of the State defendants affected the constitutional rights of the plaintiffs, the presence of the State officials as defendants was based on federal, not state law, and, therefore, Pennhurst II was inapplicable. 735 F.2d at 989-990.

(2)

The Court of Appeals also properly found a basis for jurisdiction over the State defendants under the provisions of the All-Writs Act, 28 U.S.C. §1651a. This provision authorizes a federal court to issue such commands as may be necessary or appropriate to effectuate and prevent the frustration of orders previously issued in the exercise of jurisdiction otherwise obtained. In United States v. New York Telephone Co., 434 U.S. 159 (1977), this Court upheld the use of the All-Writs Act to compel a non-party, the New York Telephone Company, to furnish facilities and

technical assistance to the F.B.I. with respect to the installation of a device which records the numbers dialed on a particular telephone. In so holding, this Court stated at 434 U.S. 174:

> "The power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice (citations omitted)."

The next case following New York Telephone in which this Court interpreted the All-Writs Act was General Building Contractors Assn., Inc. v. Pennsylvania, 458 U.S. 375 (1982). In General Contractors the plaintiffs attempted to use the All-Writs Act in support of a determination of the District Court which had imposed a remedy upon contractors and trade associations against whom there had not been any finding

of liability. The District Court subjected the contractors and trade associations to injunctive relief requiring them to take steps to ensure that union hiring hall procedures were non-discriminatory and allocated to them a portion of the costs for implementing the remedial decree. Id. at 397.

In finding that the All-Writs Act could not be used to impose a remedy against the petitioners, the Court observed that the All-Writs Act could not "support the extensive liability imposed upon petitioners by the District Court." Id. at 401. Further, the Court held (at 458 U.S. 401):

> "There was no need for the District Court to treat petitioners as strangers to this lawsuit, and therefore to rely upon some extraordinary form of process or writ to bring them before the court. Petitioners had been named as defendants by respondents in their complaint, and they litigated the injunctive liability phase of the action before the District Court. Petitioners were parties to the action in every sense of the word, and subject to the jurisdiction of

> the District Court both as to the imposition of liability and as to the framing of the remedial decree."

In contrast to General Contractors, in the instant case, the State officials were not parties during the protracted litigation leading up to determinations of liability and stipulations contained in consent decrees. The State officials were only brought into the litigation when their actions began to substantially interfere with the City's ability to comply with these orders. Moreover, the command of Judge Lasker does not impose "extensive liability". It only requires the State to promptly carry out its responsibility to assume custody of persons sentenced to terms of imprisonment in State correctional facilities.

Nothing contained in this Court's decision in Pennsylvania Bureau of Correction v. United States Marshals, 474 U.S. ___, 106 S. Ct. 355 (1985) precludes

the use of the All-Writs Act in the instant case. Pennsylvania Bureau of Correction concerned the validity of an order issued under the All-Writs Act requiring United States Marshals to transport state prisoners to federal court. This Court held that the use of that act was inappropriate under those circumstances because the district court had available to it the authority to issue a writ ad testificandum to produce a prisoner in state custody.

The Court of Appeals found that Pennsylvania Bureau of Correction was distinguishable. It noted that the facts of this case necessitated reliance on the All-Writs Acts because (A13):

> The district court was faced with the necessity of acting immediately to relieve already-adjudicated unconstitutional conditions which might be attributed in part to the State and avoiding the delay that would be entailed in the relitigation of those conditions.

Petitioners reliance on Atascadero State Hospital v. Scanlon, 473 U.S. ___, 105 S. Ct. 3142, (1985) is misplaced (Petition, p. 20). In that case the Court held that a state may not be made a defendant in an action brought under §504 of the Rehabilitation Act of 1973 in the absence of any intent by Congress to require states to waive their Eleventh Amendment immunity as a condition for participation in the program. Here, following the principles set forth in Ex parte Young, supra, we joined the appropriate State officials because their actions were having a direct effect on our ability to provide constitutionally acceptable conditions of confinement to persons held in our jails.

(3)

The State urges that the City defendants do not have standing to raise the question of noncompliance because it may not

"rest (its) claim to relief on the legal rights or interests of others" and the City's interest do not come within the "zone of interests to be protected by the constitutional guarantee in question." Petition, pps. 23-25. This argument is meritless.

The City has standing to seek to join the State in the instant proceeding because it has suffered an actual injury in fact as a result of the State's action. See Warth v. Seldin, 422 U.S. 490, 498-499 (1975); Doe v. Blum, 729 F.2d 186, 189 (2nd Cir., 1984); B.K. Instrument, Inc. v. United States, 715 F.2d 713, 718-719 (2nd Cir., 1983); National Coalition to Ban Handguns v. Bureau of Alcohol Tobacco & Firearms, 715 F.2d 632, 633-634 (2nd Cir., 1983). The City is obviously directly injured by the action of the State because it adversely impacts on the City's ability to fulfill its obligations under

the Court's orders. In making this motion to join the State officials, the City seeks to protect its own interests. We are not asserting the rights of the plaintiffs. Rather the City has a responsibility to administer its jails in a manner which is consistent with the Constitution and Judge Lasker's decrees.

In support of its argument that the City defendants do not have standing, the State gratuitously concludes that if its actions caused noncompliance with the federal court orders, the City could not be cited for contempt because it did not cause the problem. Pet., p. 24. While we are thankful for the legal opinion proffered by the State in its brief, we know of no authority that would allow the City to escape responsibility for conditions in its jails on the ground that the State caused the violation. To the contrary, at the outset of

this controversy between the City and the State, Judge Lasker made it clear that such was not the case. With respect to the State's aggravation of overcrowding in City jails, Judge Lasker commented in Benjamin v. Malcolm, supra, 495 F. Supp. 1357, 1362 as follows:

> "The City is entitled to understanding on account of the aggravation of its burden caused by the injection into its correctional facilities of such a large number of State prisoners. Yet the ultimate fact of unconstitutional overcrowding remains the same whether it is caused entirely or partly by the presence of City detainees. It is the City's obligation to provide minimally acceptable population levels for those in its custody, and even the City does not argue that it can be freed of that obligation because the present condition is significantly affected by the necessity to house State prisoners."

The State assumes that the only interest that the City has in the administration of its correctional system is the avoidance of a citation for contempt.

Apart from any litigation challenging conditions of confinement, the City officials charged with this responsibility have a desire to perform their duties in a professional manner and to avoid depriving persons held in their custody of any constitutional rights.

In another part of its brief, the State suggests that all that is involved in the instant case is a "fiscal claim" arising from the fact that (Pet., p. 23):

> "... the more inmates the City has to house, the more money it will have to spend in order to provide adequate housing and support services."

This argument is nonsense. In fact the City over the last eight years has increased its capacity by over fifty percent (51). As a result of the back-up of State readies since June of 1985, it has been necessary for the City to devote approximately fifty percent of our newly added capacity to

house State inmates (51). It is difficult for the City to implement a long term capital program with the knowledge that, when such construction is completed, the State would then absorb the additional capacity by further backing up the State ready prisoners. The State's argument is particularly meritless when viewed in the context of its action to close the one thousand bed Long Island Correctional Facility.

(4)

The Courts below properly applied the applicable standards in issuing the preliminary injunction requiring the State officials to accept custody of State readies during the pendency of the City's application within forty-eight hours of processing. A preliminary injunction will be overturned only when it is demonstrated that the District Court has abused its discretion.

See Doran v. Salem Inn, Inc., 422 U.S. 922, 931-932 (1975); Hanson Trust PLC v. SCM Corporation, 774 F.2d 47, 54 (2nd Cir., 1985); In Re Baldwin-United, 770 F.2d 328, 334 (2d Cir., 1985); Mitchell v. Cuomo, supra 748 F.2d at 806. An abuse of discretion may be found if the Court makes clearly erroneous findings of fact or commits an error of law in issuing the injunction.

For all of the reasons stated in this brief, the City has established that its application presents sufficiently serious questions going to the merits to make them a fair ground of litigation. In addition, the City would be irreparably injured if the injunction were vacated. As has been observed above, the State has used the City system as an annex to hold their overflow until the State system can accommodate the newly sentenced prisoners. This constant fluctuation of the population affects the

City's ability to manage its institutions. The injunction merely preserves the status quo which has existed since August 1981, during the pendency of the motion to join the State. In this context, the District Court noted that the determination as to whether the State will be retained permanently in the lawsuit would have to await the end of the "dispute as to whether the State's actions or proposed actions do or would hereafter place the City in a position of noncompliance with the Court's decrees" (C13).

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

February 9, 1987.

Respectfully submitted,

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